HARVARD

LAW REVIEW.

VOL. XVI. APRIL, 1903. NO. 6

THE REVIVAL OF CRIMINAL EQUITY.

MR. HOLLAND takes as the basis of his definition of the criminal law the functions which the state "discharges as the guardian of order, preventing and punishing all injuries to itself and all disobedience to the rules it has laid down for the common good."[1] In the same way we may take as a basis for a definition of the civil law the function which the state discharges in enforcing the right of the individual to security of person, reputation and property, including therein the right of the state itself in its capacity as a property owner. The foundation of equity jurisdiction to-day is the enforcement of civil law; but if a court of equity enjoin an act injurious to the community as well as to an individual, its writ will in fact enforce both public and private rights. How far such jurisdiction serves to enforce the criminal law depends on the nature and importance of the public right involved; and while it may be difficult to draw exact lines, still we can be certain that so far as the court enjoins acts which are breaches of the peace, which violate public decency, which interfere with the operation of the government, or which violate governmental rules for the maintenance of freedom of trade, its jurisdiction is essentially criminal. For whatever the court's purpose may be, in effect its decrees enforce public rights of the community which overshadow the private rights involved.

[1] Holland, Jurisprudence (7th ed.) 322; *cf.* 3 Bl. Com. 2.

Originally no such distinction or limitation was thought of; and the Court of Chancery in its earliest period designedly assumed jurisdiction to protect persons and property from violence. The reign of Richard II. found England in a turbulent and restless state. Politically it was a time of weak sovereigns; economically it was a period of transition and reformation. Manoral authority was breaking down and the power of municipalities and gilds was lessening. Highwaymen and rioters made trade and travel hazardous; powerful barons overawed the local courts.[1] No sharp line was drawn between executive and judicial powers, and chancellors, probably without stopping to analyze in what capacity, exercised the royal prerogative delegated to them by Edward III.[2] to relieve the poor and the weak. Thus many of the suits of this period, though involving property rights, in fact were instituted to preserve the peace and prevent crime.[3] The wide scope of this jurisdiction can best be seen from some of the complaints that were filed.

In 1388 we find a bill of John Biere against Roger Mule, Roger Treury and others, alleging that the defendants "came by night with force and arms" into the house of the said John and assaulted his servants and lay in wait for him so "that it behoved the said John to desert his said country," and besides they "detained the merchandise and goods" of the said John so that he could not conduct his business; and the "suppliant," as he was then called, prayed as remedy that the defendants be required to find surety that they would not harm him and that his goods be delivered to him.[4]

A few years later there is a petition or complaint of Thomas Saintquintyn against Roger de Wandesford, alleging that Roger and several other "evil-doers unknown, assembled from diverse parts, arrayed and armed as for war with the armor aforesaid," did "ambush themselves to kill and murder the said suppliant and his people," and further alleged that when the constables and bailiffs and servants and tenants of the suppliant interfered, the defendants "did set upon one Robert Spynes and Laurence of Bridlington . . . and did beat, maim and ill-treat them . . . and therefore the said suppliant hath lost the services of his tenants and servants."

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[1] See 1 Cunningham, Growth Eng. Commerce 335; Gneist, Eng. Const. 334.

[2] 22 Edw. III.

[3] A large number of instances are to be found in Select Cases in Chancery, Selden Society Publications, vol. x.

[4] Select Cases in Chancery, No. 5.

For all of which the said suppliant prayed "remedy in safeguard of the peace."[1]

An early form of combination in restraint of trade appears in a bill filed in 1397 by William Lonesdale, alleging that because he had sold his merchandise, to-wit, herring and other fish, at a less price than the other merchants of the town, Richard Suffyn and "other evil-doers, of their covin, lay in wait with force and arms to kill the said William, and assaulted and beat him."[2]

The jurisdiction to protect the rights of landowners is shown in a suit in the reign of Henry IV., where "Edmund Fraunceys grocer and citizen of London" alleges that he was seized of certain lands by livery on writ of execution, and that "by the maintenance and conspiracy of James de Clifford and Hugh de Byslee . . . no man or farmer of said County dare occupy or till the said lands and tenements to the use and profit of the said Edmund, through the strength, maintenance and procurement of the said James and Hugh," and the bill prays a writ directed to the sheriff and the justices of the peace to command James and Hugh that they shall "suffer the said Edmund . . . to occupy and till the said lands and tenements . . . without any intermeddling or disturbance."[3]

This jurisdiction, however, was always unpopular; and gradually, as the government became more stable and the courts of law more efficient, the need for a criminal equity lessened, and little by little the chancellor's criminal jurisdiction fell off, until finally toward the end of the fifteenth century its exercise ceased entirely.[4]

The King's Council had co-ordinate jurisdiction with the chancellor, and it relinquished its criminal jurisdiction more slowly. The Council had come to be called the Court of Star Chamber from the name of the room it occupied; and its jurisdiction was widely extended with salutary result in the disorderly times that followed the War of the Roses.[5] But its summary methods applied to the trial of crimes eventually became arbitrary and tyrannical, and the court became so odious that it was abolished by statute in 1645.[6]

The popular fear and dislike of the criminal jurisdiction of chancery undoubtedly contributed to the general distrust of the court,

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[1] Select Cases in Chancery, No. 17.

[2] *Ibid.*, No. 23.

[3] *Ibid.*, No. 70.

[4] *Ibid.*, Introduction xxi.; 1 Spence, Eq. Juris. 688, 689; *cf.* 1 Story, Eq. Juris. § 48.

[5] 1 Spence, Eq. Juris. 350; Gneist, Eng. Const. 507 and note.

[6] 16 Car. I. c. 10.

and to the consequent opposition of the Commons which hampered even its civil jurisdiction.[1] It was not until the eighteenth century that the jurisdiction of the court became firmly fixed, and at that time it no longer made any attempt to enforce the criminal laws.

However, the court never ceased to assert its right to protect property from irreparable injury, even if the act involved were also a crime.[2] But the jurisdiction was sparingly exercised. The power to enjoin public nuisances seems to have lapsed in the time of Charles I., and was not brought forward again until 1795.[3] Libels, even if injurious to property rights, were not enjoined at all;[4] perhaps because it was feared the Commons would regard such a jurisdiction as an infringement of freedom of speech.[5]

Still, now and then injunctions were issued against criminal acts, for example against the publication of libelous letters because the plaintiff had a right of literary property in them,[6] and against the issuance of circulating notes in derogation of the coinage of a foreign state.[7] These occasional decisions preserved the nucleus of the jurisdiction from which the law of to-day has grown.

In the United States particularly the power of courts of equity has become greatly extended. One reason of this doubtless has been that the elective character of the judiciary has lessened popular distrust of judges. At the same time new problems of constitutional law and of municipal authority have raised new questions for courts of equity, and as a result have accustomed the people to the exercise of broad chancery powers. The more complicated relations of capital and labor, the severer struggle for existence, the growing tendency to the incorporation of business enterprises and the consolidation of corporations have given rise to new demands on the legal system; and the uncertainty of trials in criminal courts, due both to their fostering of technicality and the low standards of their juries, have made people turn for relief to courts of equity.

The interest of the public has been awakened by the injunctions issued in controversies between employers and organized labor;

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[1] 1 Spence, Eq. Juris. 343-346; see 17 Rich. II. c. 6; Cary's Reports, Appendix.

[2] Emperor of Austria *v.* Day, 3 De G. S. & F. 217; Macaulay *v.* Shakell, 1 Bli. N. S. 96; Prudential Ass. Co. *v.* Knott, 10 Ch. App. 142.

[3] Atty.-Gen. *v.* Richards, 2 Anst. 603; see Kent, J., in 2 Johns. Ch. 382.

[4] Gee *v.* Pritchard, 2 Swanst. 402; Prudential Ass. Co. *v.* Knott, 10 Ch. App. 142.

[5] See Trial of Scroggs, 8 How. St. Tr. 162.

[6] Gee *v.* Pritchard, 2 Swanst. 402.

[7] Emperor of Austria *v.* Day, 3 De G. S. & F. 217.

but these writs represent only one phase of the modern interference of equity with criminal acts. In these cases the jurisdiction is exercised at the suit of a private individual seeking to protect a private right; beyond them are the cases where the state brings suit in order to prevent the violation of a right belonging to it in its public capacity. All the cases, however, in fact administer the criminal law; for the rights enforced in them include public rights of the community which are of much greater moment than the private rights involved. We can group the cases into three classes according to the nature of the public rights enforced.

1. Cases involving the preservation of the peace or the prevention of concerted action to injure property — such are the numerous cases growing out of labor controversies.

2. Cases involving the prevention of violations of public decency — such are suits to enjoin the maintenance of saloons or brothels.

3. Cases involving the protection of the public from combinations in restraint of trade.

1. The use of the writ of injunction to preserve the peace and prevent concerted action to injure property in labor controversies originated with the case of Springhead Spinning Co. *v.* Riley.[1] There the court enjoined striking workmen from posting placards to keep other workmen away; and although the case was afterwards strongly disapproved,[2] its example was followed. In America the doctrine has been liberally extended; and the courts have assumed jurisdiction to restrain acts of every kind intended to coerce employers by preventing workmen from taking the place of strikers. So injunctions have issued to restrain strikers from surrounding and following workmen, and ridiculing or menacing them;[3] from parading and displaying banners before a factory;[4] from maintaining a patrol to keep other workmen away;[5] from marching and countermarching and standing about the entrance of

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[1] L. R. 6 Eq. 551.

[2] Prudential Ass. Co. *v.* Knott, 10 Ch. App. 142.

[3] Coeur d'Alene Mining Co. *v.* Union, 51 Fed. Rep. 260; Lake Erie & W. Ry. Co. *v.* Bailey, 61 Fed. Rep. 491; Consol. Steel & Wire Co. *v.* Murray, 80 Fed. Rep. 811; Davis *v.* Zimmerman, 91 Hun, 489; Shoe Co. *v.* Saxey, 131 Mo. 212; Bruschke *v.* Furniture Makers Union, 18 Chi. L. N. 306; Murdock *v.* Walker, 152 Pa. St. 595; Wick China Co. *v.* Brown, 164 Pa. St. 449; Cumberland Glass Mfg. Co. *v.* Glass Bottle Blowers' Assn., 59 N. J. Eq. 49.

[4] Sherry *v.* Perkins, 147 Mass. 212; Beck *v.* Protective Union, 118 Mich. 497.

[5] Vegelahn *v.* Guntner, 167 Mass. 92.

a place of work;[1] and even from conspiring to prevent the loading of a boat except by union men.[2] Relief has also been granted against acts by workmen intended to coerce employers by depriving them of a market for their goods, and thus boycotts have been enjoined.[3] The same principle applies to concerted acts of workmen to coerce other workmen into joining a union by interference with their employment; accordingly the Supreme Court of Massachusetts enjoined union workmen from circulating a black list of members of a rival union intended to compel their employers to discharge them.[4]

In all these cases the basis of the jurisdiction has been the prevention of irreparable damage for which there was no adequate remedy at law. Some few judges have been cautious and have required clear proof of the threatened irreparable damage and of the insolvency of the defendants;[5] but the power to issue an injunction if necessary was conceded even by them. The existence of a remedy by criminal action, however, has been so much overlooked that New York courts have held that if no violence be threatened — that is, if no breach of the peace be involved — an injunction cannot issue.[6]

Another line of similar cases of interference in order to afford protection in disputes between master and servant has arisen in receivership cases. An interference with property in the hands of a receiver, and therefore in *custodia legis*, is a contempt of court; and this principle has been applied to the choses in action and intangible property in the control of receivers, and thus has been extended to the relations of receivers with their employees. Naturally the wide applications of this doctrine have been in railway receiverships. It has been held to be contempt not only to interfere by violence with the operation of a railway in the custody

[1] Mackall *v.* Ratchford, 82 Fed. Rep. 41; American Steel & Wire Co. *v.* Wire Drawers Union, 90 Fed. Rep. 608; Cumberland Glass Mfg. Co. *v.* Glass Bottle Blowers' Assn., 59 N. J. Eq. 49.

[2] Elder *v.* Whitesides, 72 Fed. Rep. 724.

[3] Barr *v.* Essex Trade Council, 53 N. J. Eq. 101; Casey *v.* Typographical Union, 45 Fed. Rep. 135; Oxley Stave Co. *v.* Coopers' Union, 72 Fed. Rep. 695; Hopkins *v.* Oxley Stave Co. (same case on appeal), 83 Fed. Rep. 912. But see Sinsheimer *v.* Union Garment Workers, 77 Hun, 217.

[4] Plant *v.* Woods, 176 Mass. 492.

[5] Mechanics Foundry *v.* Ryall, 62 Cal. 416; s. c. 75 Cal. 601; Longshore Printing Co. *v.* Howell, 26 Ore. 527; De Pear *v.* Cook's Union, 27 Chi. L. N. 387.

[6] Rogers *v.* Evarts, 17 N. Y. Supp. 264; Krebs *v.* Rosentein, 66 N. Y. Supp. 42; 67 N. Y. Supp. 385.

of a receiver,[1] but even to order a strike with intent to hinder its management.[2] Likewise to make receivers more secure, writs of injunction have been issued for their protection, and thus employees of a railroad in a receiver's custody have been enjoined from refusing to haul certain cars,[3] and from interfering with workmen on the road, or conspiring to leave so as to cripple the road or by any device to hinder its operations.[4]

These injunctions preventing interference with the operation of a railway made it easy for the court to reach the Debs case.[5] For us that case is important, because it extended the issue of injunctions to preserve property from injury by violence to a suit brought, not at the instance of a private property owner or a receiver for whose protection the court was pledged, but by the government itself. The decision rests on the theory that the United States has a property interest in the mails, and that the stoppage of trains would injure this property right and would also be an interference with interstate commerce; but in fact the injunction restored the peace so that trains could be operated. Although the influence of the Supreme Court of the United States makes the Debs case universally accepted as law, still there has been no case directly following it, and it had no direct precedent to justify it, excepting possibly a bare *obiter* statement of the Supreme Court of Louisiana,[6] which is not even referred to in the opinion.

2. The same development, beginning with suits to protect the property of private persons and then extending to suits by the government itself, occurred in the cases brought to prevent violations of public decency. The jurisdiction rests on the power of the court to enjoin nuisances. In the narrow sense legal nuisances include injuries to lands caused by acts done on other lands, and also encroachments on or injuries to incorporeal hereditaments.[7] Obstructions of the public right of way in a street or a stream are public nuisances in this sense; and injunctions are granted against them because of the public property right involved. Even in these cases, however, the jurisdiction of equity developed slowly. Lord Brougham spoke of it "as of recent growth," and said that it "had not till very lately been much exercised, and had

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[1] *In re* Doolittle, 23 Fed. Rep. 544.
[2] *In re* Higgins, 27 Fed. Rep. 443
[3] *In re* Lennon, 166 U. S. 548.
[4] Arthur *v.* Oakes, 63 Fed. Rep. 310.
[5] *In re* Debs, 158 U. S. 564.
[6] State *v.* Fagan, 22 La. Ann. 545.
[7] See Langdell, 1 HARV. L. REV. 123.

at various times found great reluctance on the part of the learned judges to use it, even in cases where the thing or act complained of was admitted to be directly and immediately hurtful to the complainant." [1]

The term "nuisance" is also applied to anything causing serious inconvenience or annoyance, and in that sense the term "public nuisance" came to be applied to any place conducted so noisily or wantonly as to be a source of danger or annoyance to the neighborhood, such as a gambling-house or a brothel.[2] No property right of the public or of any considerable number of persons is involved in these cases; and the common law provides a remedy by writ of prohibition.[3] Nevertheless later judges disregarded the earlier limitations upon this jurisdiction, and not only began freely to enjoin injuries to public property, but even extended the jurisdiction so as to include public nuisances caused by indecent or disorderly conduct. The first injunctions were issued at the instance of private parties who sued because the disorderly character of brothels seriously impaired the value of their neighboring property.[4] The possibilities of this jurisdiction were subsequently taken advantage of by legislatures in states having prohibitory liquor laws.

It is well settled common law that the legislature may define public nuisances and may extend the definition so as to include new classes of cases.[5] Accordingly the legislatures of many states enacted statutes declaring saloons to be nuisances and providing for suits by the state to enjoin them. Many courts have been slow to sanction suits by the state to enjoin public nuisances of this character because no property rights were involved; and so in the absence of statutes they have refused to entertain bills filed by the state to enjoin gambling,[6] or the maintenance of saloons in defiance of prohibitory laws.[7] On the other hand, other courts of good standing have been quick to assume this jurisdiction, and even in the absence of statutes have issued injunctions at the instance of the

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[1] Earl of Ripon *v.* Hobart, 3 Myl. & K. 169.

[2] Bacon, Abr. Title Nuisance.

[3] Bacon, Abr. Title Nuisance; Jacob Hall's Case, 1 Vent. 169; King *v.* Betterton, 5 Mod. 142.

[4] Hamilton *v.* Whitredge, 11 Md. 128; Cranford *v.* Tyrrell, 128 N. Y. 341, 344.

[5] King *v.* Gregory, 5 Barn. & Ald. 555.

[6] State *v.* Patterson, 37 S. W. Rep. 478 (Tex.); People *v.* Dist. Ct., 26 Col. 386.

[7] State *v.* Crawford, 28 Kan. 726; State *v.* Schweickhart, 109 Mo. 501.

state against the conduct of prize fights[1] or the evasion of liquor laws.[2] In the states where legislatures have enacted statutes declaring saloons to be public nuisances for the purpose of invoking this jurisdiction, injunctions have been unhesitatingly issued at the instance of the state;[3] and the Supreme Court of the United States has added its weight to sustain the doctrine.[4] In all these cases the courts do not seem to have appreciated that such suits merely enforce public order and decency; and consequently they have overlooked entirely the consideration urged by the Supreme Court of Texas that no threatened injury to the property or the civil rights of the state was involved, and that the mere fact "that the law against the offense is not enforced or observed is no ground for the interference of a court of equity."[5]

These decisions naturally have tended to make courts of equity careless of the traditional limitations of their jurisdiction, and the Supreme Court of Georgia has gone so far even as to enjoin the stealing of oysters from a bed owned by the state;[6] while the Supreme Court of Texas itself has sanctioned an injunction to prevent the alienation of a wife's affections.[7]

3. One effect of these injunctions was to accustom people to the suppression of crimes by courts of equity in cases where prosecutions at law were ineffective; and under circumstances that remind us of the time of Richard II., when his nobles overawed the local courts, legislatures have invoked the aid of courts of equity to prevent injuries to the public by wealthy and influential corporations. As precursor of this jurisdiction there is a solitary case in Delaware where an injunction issued against the abuse of a privilege of a lottery.[8] The great step forward came much later when consolidations of competing railway lines were enjoined at the instance of the state.[9] The decisions all rest on the ground that the consolida-

[1] Columbian Athletic Club *v.* State, 143 Ind. 98; State *v.* Olympic Club, 35 La. Ann. 935 (*sem.*); State *v.* Hobart, 8 Ohio N. P. 246.

[2] State *v.* Fegar, 29 S. E. Rep. 463 (Ga.).

[3] Ellenbach *v.* Plymouth, 69 Ia. 240; State *v.* Jordan, 72 Ia. 377; Carleton *v.* Rugg, 149 Mass. 550; State *v.* Saunders, 66 N. H. 39; State *v.* Durevin, 46 Kan. 695; State *v.* Markinson, 5 N. Dak. 147; State *v.* Mitchell, 3 S. Dak. 223.

[4] Ellenbach *v.* Plymouth, 134 U. S. 31; Kansas *v.* Ziebold, 134 U. S. 531.

[5] State *v.* Patterson, 37 S. W. Rep. 478 (Tex.).

[6] Jones *v.* Oemler, 110 Ga. 202.

[7] *Ex parte* Warfield, 50 S. W. Rep. 933.

[8] State *v.* Maury, 2 Del. Ch. 141.

[9] Penn. R. R. Co. *v.* Commonwealth, 7 Atl. Rep. 374 (Pa.); Trust Co. of Ga. *v.* State, 109 Ga. 736; L. & N. R. R. *v.* Commonwealth, 97 Ky. 675; affirmed 161 U. S. 677; Stockton Atty.-Gen. *v.* Central R. R. Co., 50 N. J. Eq. 52.

tions would be *ultra vires*, but the courts recognized that the acts were objectionable because they violated statutory or constitutional provisions which established the policy of the state; and the Supreme Court of Georgia laid down the rule that the state can sue not only where its property is involved, but also where "the public interests are threatened and jeopardized."[1] On somewhat similar lines an injunction was granted at the suit of an oil inspector to prevent the fraudulent marking of oil as inspected,[2] and injunctions have issued at the instance of municipalities to enjoin the unlawful erection of telephone poles[3] and the improper laying of street railway tracks.[4]

The Congress of the United States has also invoked this jurisdiction to prevent violation of the interstate commerce law and unlawful combinations in restraint of trade. The Interstate Commerce Act provides that in event of any disobedience of an order of the interstate commerce commission not founded on a controversy requiring a jury trial under the Constitution, the commission may apply in a summary way for relief by petition to the circuit court sitting in equity, and that the court shall then determine the matter speedily and on short notice.[5] The Supreme Court sustained this jurisdiction without discussion, undoubtedly assuming that the violation of the Interstate Commerce Act did not require a trial by jury and that a court in equity could enforce the law.[6]

The same broad use of equity powers is provided for in the Sherman Act prohibiting monopolies and combinations in restraint of trade.[7] The Supreme Court held that the United States could sue to declare combinations in restraint of trade void and to enjoin combinations to fix rates or monopolize traffic; and it answered the objection that the United States had no interest to maintain a suit, in the following language: "Congress having the control of interstate commerce, has also the duty of protecting it, and it is entirely competent for that body to give the remedy by injunction as more efficient than any other civil remedy."[8]

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[1] Trust Co. of Ga. *v.* State, 109 Ga. 736. [2] Young *v.* Emery, 155 Pa. St. 273.

[3] Utica *v.* Utica Tel. Co., 48 N. Y. Supp. 916.

[4] Shamokin *v.* Elec. Ry. Co., 196 Pa. St. 166.

[5] Act of Mar. 2, 1889, § 5.

[6] T. & P. Ry. Co. *v.* Inter. Com. Commis., 162 U. S. 197; Inter. Com. Commis. *v.* B. & O. R. R., 145 U. S. 264; see D. C. H. & M. Ry. *v.* Inter. Com. Commis., 74 Fed. Rep. 803.

[7] Act of July 2, 1890.

[8] U. S. *v.* Trans-Missouri Freight Assn., 166 U. S. 290.

How far this doctrine goes, even in its application under this anti-trust legislation, can best be seen by examining the bills of complaint in the recent "railway merger" and "beef trust" cases. In the railway merger case the complaint prays that the court "decree that the combination or conspiracy hereinbefore described is unlawful, and that all acts done or to be done in carrying it out are *in derogation of the common rights of all the people of the United States* and in violation of the Act of Congress of July 2, 1890 . . . and that the defendants . . . be perpetually enjoined from doing any act in pursuance of or for the purpose of carrying out the same."[1]

In the beef trust case the complaint alleges that the defendants "do and will artificially restrain such commerce . . . all to the manifest injury of the people of the United States and in defiance of law," and the prayer is that they be enjoined "from continuing each and any of the *unlawful* proceedings aforesaid."[2]

In each of these three classes of cases we thus mark the same development — the jurisdiction began with suits to prevent injuries to private property by criminal acts, and then gradually extended to suits brought by the state itself to enforce its rules laid down for the public good. In all these cases, however, the real purpose of the suit is not to determine whether the plaintiff has rights that ought to be protected from injury, but to prevent the defendant from violating unquestioned rights. The principle on which courts of equity enforce summary punishment for contempt is that the real controversy in the case is the right to the injunction, and that in order to make the adjudication of that controversy effective the court will take summary measures to enforce obedience to its writ. The situation becomes very different when the right to the injunction is conceded, and the only issue that can be raised will be whether or not specific acts committed after entry of the decree violate that injunction. Then the court is no longer using its power of punishment to make its adjudications of controversies effective; but it is making its process of contempt a means for a summary enforcement of the administrative law.

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[1] U. S. *v.* Northern Securities Co. *et al.* now pending in U. S. Circuit Court of Minnesota.

[2] U. S. *v.* Swift *et al.*, now pending in U. S. Circuit Court for Northern Dist. Illinois. Demurrers to the complaint were overruled and a temporary injunction ordered February 18, 1903.

Justice Field of Massachusetts demonstrated this in a dissenting opinion where he says:

"The issue of the injunction adds nothing to the prohibition of the statutes, but the intention plainly is to call into use the peculiar process employed by courts of equity in punishing persons guilty of wilful violation of injunction. There can be no decree for damages, or for a penalty, or directly affecting the title or condition of the property."[1]

Justice Dargan of Alabama based a decision on similar grounds in 1848 in a suit brought by a railway company to enjoin a land-owner, part of whose lands the company had condemned, from molesting the employees of the company in the building of its line.

"The courts of law have complete jurisdiction to punish the commission of crime, and can interpose to prevent their commission by imprisoning the offender or binding him over to keep the peace. But equity has no jurisdiction over such matters, at least a court of equity cannot entertain a bill on this ground alone. If the bill had shown any doubt in the title of the company, arising from the wrongful act of the defendant, after the company had done all they could under the statute to give them the right-of-way, perhaps the bill might have been sustained to remove the doubt or perfect their title. But under the allegations of the bill, the title of the complainants is perfect; and the only ground of equity being to restrain the defendant from doing personal violence to the agents of the company in constructing and using the railroad, and from obstructing illegally said company in the prosecution of their work, the chancellor properly dismissed the bill."[2]

This reasoning becomes much more cogent when the application for protection from violation of the rules of government is made, not by an individual whose property may be damaged, but by the government itself for the purpose of protecting the public at large.

It is beyond question that the exercise of this jurisdiction has been remarkably effective. It has protected workmen from violence; prevented interference with the operation of railways and mines; suppressed prize-fights, gambling-houses and brothels; and it has at least made cautious corporations combining in restraint of trade. A large number of adjudications have established the practice; and the issue of such injunctions is now so much a matter of course that many courts would probably not even listen to an argument in opposition to the jurisdiction. But the well fixed

[1] Carleton *v.* Rugg, 149 Mass. 559.

[2] Montgomery *v.* Walton, 14 Ala. 207.

character of the jurisdiction and the beneficial results of its exercise tend to make us overlook its shortcomings and the dangers that lie hidden beneath it. For whatever be the name or form we give to the proceeding, such injunctions do in fact administer the criminal laws, and in bringing the procedure of courts of equity to the establishment and punishment of crimes they violate fundamental principles of our jurisprudence. Judges have justified the jurisdiction in these cases on the ground that there was no adequate remedy provided at law. The inadequacy of remedy at law, however, was due not to the lack of a method of procedure, but to the failure properly to enforce that procedure. An injunction of a court of equity does not in itself physically prevent an unlawful act. It is merely a mandate of the court forbidding the act. In every one of these cases the same prohibition had already come from the legislature, and the statutes provided punishment for violation of the legislative prohibition more severe than any punishment that could have been inflicted for contempt of the prohibition of the court. Boycotts, violent strikes and combinations deliberately designed to injure another in his business are every one of them punishable at law as criminal conspiracies — combinations of two or more persons to do an unlawful act.[1] Likewise every criminal code provides punishments for those who make a place a public nuisance because public statutes are "openly, publicly, repeatedly, continuously, persistently and intentionally violated there" — the ground on which the Indiana Court sustained an injunction.[2]

Justice Brewer quotes the leaders of the strike at Chicago as saying that the strike was broken, "not by the army and not by any other power, but simply and solely by the action of the United States courts in restraining us." Yet these injunctions were disobeyed; and it was not until troops were marshalled and rioters were apprehended by force that order was restored. True, the courts inflicted summary punishment for contempt, but fear of that punishment did not become a deterrent from crime till it had behind it the strength of the army. It was really martial law that restored the peace at Chicago. The injunctions were effective only because they furnished a method of summary trial. The same

[1] Commonwealth *v.* Hunt, 4 Met. (Mass.) 111; State *v.* Glidden, 55 Conn. 46; State *v.* Stewart, 59 Vt. 273; U. S. *v.* Pettibone, 148 U. S. 197; People *v.* Sheldon, 139 N. Y. 251; State *v.* Huegin, 110 Wis. 189. See 21 Am L. Rev. 41.

[2] Columbian Athletic Club *v.* State, 143 Ind. 98.

result could have been attained in the same way through courts martial.

We prohibit courts martial and guarantee to those accused of crime trial by jury under constitutional safeguards, because our history has proved that the dangers of abuse of authority through methods of summary trial are evils that cannot be compensated for by the greater efficiency the system produces. Summary trials based on injunctions to prevent crime have been effective in maintaining the peace in the same way that the criminal jurisdiction of the Court of Chancery was effective in the reign of Richard II.; and the jurisdiction is arousing the same opposition that the Court of Chancery had to contend with until well into the eighteenth century. It is doubtless true that many leaders of labor unions oppose injunctions because the prevention of violence frequently terminates strikes, but the public at large who have been aroused by these injunctions are not actuated by any desire to destroy the peace. They themselves do not analyze the grounds of their opposition, but it really is a vague feeling that traditional safeguards are being encroached upon, and with this there is a growing apprehension of one-man power. The people do not discriminate between the procedure of courts of law and courts of equity — they feel only that the government is punishing unlawful acts by methods contrary to the traditional law. We can find a reason for this in the original charters of liberty. They make no distinction as to procedure, but they guarantee that "no freeman shall be taken or imprisoned . . . or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers or by the law of the land." [1] It is this feeling that had brought forth the movement toward legislation requiring jury trials in cases of contempt. Courts of equity act *in personam*, and their adjudications of controversies are effective only because of the certainty of summary punishment for contempt. To permit the inevitable uncertainties of jury trials in such proceedings would undermine the entire strength of the system. The remedy must be applied not to the enforcement of injunctions, but to the jurisdiction to issue them; and unless the issue of these injunctions be restricted ill-advised legislatures yielding to popular clamor may seriously impair our judicial system by curtailing the power of punishment for contempt.

[1] Magna Charta, § 39. See 1st Chart. H. III., § 32; 2d Chart. H. III., § 35; Petition of Right (3 Car. I. c. 1), § 3.

In view of the large number of adjudications the courts themselves can now do but little; and remedy must be sought through legislation. Relief can be had by merely enacting that a writ of injunction shall not issue to enjoin any act the commission of which would be either a felony or a misdemeanor, and by repealing any existing statutes authorizing suits in equity by the government itself to prevent violation of its rules enacted for the public good, such as the suits to enjoin restraints on trade or the maintenance of gambling-houses or saloons. It is true that in the cases involving monopolies, the public has welcomed this jurisdiction because it has been effective in coping with offenders too powerful or influential to be reached by the criminal courts; but sooner or later the exercise of such jurisdiction leads to abuse, and eventually it must weaken the influence of the court just as it did in the fifteenth century. The result of such legislation would not be anarchy. The difficulties we now suffer from in criminal trials are due largely to the weakness of prosecuting attorneys and executive officers, and the low standard of intelligence of our juries. If we were brought face to face with the problem of maintaining order only by means of the criminal courts, though the process might be slow, the final result would be that our criminal prosecutions would be made effective; at the same time courts of equity would be freed from the danger of arousing popular opposition to their procedure by their enforcement of the criminal law.

Edwin S. Mack.

MILWAUKEE, February, 1903.